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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a popularly enacted state constitutional amendment precluding special state or local legal protections for homosexuals and bisexuals violates a fundamental right of independently identifiable, yet non-suspect, classes to seek such special protections.

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BRIEF FOR PETITIONERS

The Governor of Colorado, and the State of Colorado, through Gale A. Norton, the Attorney General of Colorado, urge this Court to reverse the decision of the Colorado Supreme Court and hold that Colo. Const. art. II, § 30b ("Amendment 2") does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinions of the Colorado Supreme Court (Pet. App. B and D) are reported at 882 P.2d 1335 (Colo. 1994) and 854 P.2d 1270 (Colo. 1993), respectively. The opinions of the trial court (Pet. App. C and E) are not reported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. The opinion of the Colorado Supreme Court was issued on October 11, 1994, and modified on November 7, 1994. The judgment of the Colorado Supreme Court (Pet. App. A) was entered on November 14, 1994. Petitioners filed the petition for certiorari on December 12, 1994. The petition was granted on February 21, 1995.

CONSTITUTIONAL PROVISIONS

Article II, § 30b of the Colorado Constitution provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves the validity of a Colorado constitutional amendment, popularly known as "Amendment 2," which precludes any state or local governmental entity from adopting or enforcing any law or policy providing special protections for homosexuals and bisexuals. Pet. App. D-25.[1] The Colorado Supreme Court conclusively determined that "the immediate objective" of Amendment 2 was "to repeal existing [laws] of state and local entities that barred discrimination based on sexual orientation." Pet. App. D-24. At bottom, Amendment 2 constitutes a fundamental decision by the State's citizens concerning "a particular division of authority . . . between state and local governing bodies." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 493 (1982). The pivotal legal issue in this case is whether, as the Colorado Supreme Court held, the federal Constitution dictates a different division of authority among institutions of local government whenever the matter at issue implicates the interests of any "independently identifiable group."

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[1]The Colorado Revisor of Statutes renumbered this provision as art. II, § 30b for "ease of location." Colo. Rev. Stat., Vol. 1A (1994 Supp.).

A. Proceedings Below.

Amendment 2 was adopted at the November 1992 general election, by a vote of 813,966 in favor and 710,151 against (53.4% to 46.6%). Respondents instituted this lawsuit in a Colorado state court under 42 U.S.C. § 1983, claiming that Amendment 2 *facially* violates several provisions of the federal constitution. The trial court preliminarily enjoined Petitioners solely on legal grounds from enforcing Amendment 2 pending the outcome of a trial on the merits. Pet. App. E-18.[2]

On July 19, 1993, the Colorado Supreme Court affirmed the issuance of the preliminary injunction, albeit on different grounds. Pet. App. D. The court determined that Amendment 2 presumptively violated a "fundamental right" protected by the Equal Protection Clause of the Fourteenth Amendment, of any identifiable group to have political issues addressed at all levels of government. Consequently, the Colorado Supreme Court affirmed and remanded the matter for a trial on whether Amendment 2 is narrowly tailored to achieve a compelling state interest.

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[2]Citing *Palmore v. Sidoti*, 466 U.S. 429 (1984), the trial court concluded Amendment 2 infringed upon a so-called fundamental "right not to have the State endorse and give effect to private biases" affecting "an identifiable class." Pet. App. D-5; Pet. App. E-15 through E-17. Respondents did not defend this "right" on appeal, characterizing the trial court's ruling as "best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation . . . ." Pet. App. D-6. The Colorado Supreme Court accepted Respondents' concession, and in its two opinions, never referred to *Palmore* again.

Trial was held October 12-22, 1993. In addition to whether Amendment 2 was supported by a compelling state interest, the parties also litigated whether homosexuals and bisexuals constituted a "suspect" or "quasi-suspect" class for equal protection purposes. The trial court ruled that homosexuals and bisexuals do not constitute a suspect or quasi-suspect class. Pet. App. C-18, C-19. With respect to the new "right," the court found that Amendment 2 promotes two compelling interests -- religious freedom and familial privacy. The court nonetheless held the provision unconstitutional because it is not narrowly drawn to achieve those purposes in the least restrictive manner possible. Pet. App. C-14.

On October 11, 1994, the Colorado Supreme Court affirmed, restating its earlier holding that Amendment 2 infringes upon a fundamental right of an identifiable group to participate equally in the political process, and upholding the trial court's determination that Amendment 2 was not narrowly tailored to the State's compelling interests. Pet. App. B. The supreme court expressly noted, however, the trial court's findings and conclusions rejecting Respondents' suspect or quasi-suspect class claim. Pet. App. B-6 n.3. The court further noted that Respondents had not appealed that aspect of the case, and accordingly refused to consider the issue. *Id.*

B. Statement of Facts.

At the time Amendment 2 was proposed, a number of governmental entities in Colorado had granted special legal protections to homosexuals and bisexuals: three cities (Denver, Boulder, and Aspen) had sexual orientation ordinances regulating employment, housing, and public accommodations; the Colorado Civil Rights Commission had voted to recommend that the Colorado General Assembly

extend the State's civil rights act to ban discrimination based upon sexual orientation; the Governor had issued an executive order prohibiting job discrimination for state classified employees based on sexual orientation; at least two state colleges had policies prohibiting discrimination based on sexual orientation; and the General Assembly had enacted a statute prohibiting health insurance companies from determining insurability based on sexual orientation.[3]

Believing that the General Assembly and other governmental officials were not sufficiently responsive to the public on this particular issue, the sponsors of Amendment 2 decided to take the issue directly to the people. In the words of those sponsors, Amendment 2 was intended to prevent homosexuals and bisexuals from receiving a preferred status under state and local laws (J.A. 150-51).[4] Individuals would retain precisely the same rights under state and federal law that they had prior to the enactment of the special protections repealed by Amendment 2. Supporters of the Amendment claimed that the extension of minority status or preference laws to include sexual orientation would be

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[3]Legislative Council of the Colorado General Assembly, *An Analysis of 1992 Ballot Proposals*, Research Publ. No. 369 (1992) (Pet. App. F). Over 204,000 copies of this analysis were distributed statewide to the voters (v. 3, pp. 65-66).

[4]The record in this case consists of nineteen volumes of pleadings and transcripts, and numerous exhibits and affidavits. Volume and page references to the main record, whether to pleadings or to transcribed testimony, are indicated by a "v." and "p." Petitioners were defendants below; Respondents were plaintiffs below. Exhibits and affidavits will be referred to as "Ex." and "Aff.," respectively.

tantamount to granting special rights, which are not enjoyed by the public at large. Indeed, as one of the civil rights experts observed,

> every civil rights provision ends up awarding special privileges. And, it does that because the property right is vested in the owner. The right to rent or dispose is one of the great and honored roots in our society. So if you redefine a class that has a right to limit your discretion in disposal and use, you have transferred the property right from the prior title holder to this class. And, that constitutes a very large privilege.

J.A. 209.

Amendment 2 faced significant opposition, including many prominent figures and organizations, such as the Governor, the Colorado Civil Rights Commission, the American Civil Liberties Union, the League of Women Voters, at least 300 Denver area religious leaders, and most of the newspapers in the State (J.A. 158-61, 173; v. 16, pp. 1044, 1050). Amendment 2's opponents outspent its supporters by a nearly 2-1 margin (J.A. 165; v. 16, p. 1046; Df. Ex. S). Even so, the people approved Amendment 2 after a spirited campaign which the trial court found to be a classic example of democratic self-government:

> [W]hat I saw was a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied for or were part of a lobbying effort for the passage of the Amendment,

and that involved spending money and presenting their views.

> There was absolutely nothing wrong with that. As a matter of fact, this is exactly in keeping with the political process that this country is based on. And this Court, should there be an attack on that process, would vigorously defend those persons who have been involved with that process because they have followed exactly what democracy urges.

Pet. App. E-10.

C. Colorado Supreme Court Opinions.

The cornerstone of the Colorado Supreme Court's first opinion in this case was its conclusion that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest." Pet. App. D-14. According to the majority, this concept found its "most explicit, and nuanced, articulation" in *Hunter v. Erickson*, 393 U.S. 385 (1969), and its progeny. Pet. App. D-14.[5] Interpreting *Hunter* as not limited to "special burdens on racial minorities within the governmental process," the court below found that

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[5]The Colorado Supreme Court found that this concept was also the "common thread which unites" this Court's cases concerning preconditions on the right to vote (*e.g.*, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969)), reapportionment (*e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964)), and candidate eligibility (*e.g.*, *Williams v. Rhodes*, 393 U.S. 23 (1968)); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)). Pet. App. D-13 through D-14.

Amendment 2 infringed upon a "fundamental right to participate equally in the political process" because homosexuals and bisexuals were no longer "free to appeal to state and local government for protection against discrimination based upon their sexual orientation . . . ." Pet. App. D-14, D-25 and D-27.

In its second opinion, the Colorado Supreme Court reaffirmed its core holding, addressed the various governmental interests asserted by the State, and held that Amendment 2 is unconstitutional under strict judicial scrutiny. Pet. App. B-7 through B-22.

Justice William H. Erickson dissented in both appeals because the majority had blurred "fundamental rights" cases with "suspect class" cases, and selectively used language from each, to create a heretofore unknown federally-mandated group-based fundamental right. Pet. App. B-37; Pet. App. D-42 through D-43. Justice Erickson found that this Court's decisions, as well as the analysis of constitutional scholars, refute the existence of any such fundamental right. Rather, he said, this Court's cases support strict-scrutiny review only where a suspect class is adversely affected by a restructuring of the political process. Pet. App. D-55. In Justice Erickson's view, the appropriate standard of review under the Equal Protection Clause is the rational basis test, and Amendment 2 easily satisfies this test. Pet. App. B-46 through B-53.

SUMMARY OF ARGUMENT

The question in this case is even more "extraordinary" than the one in *Washington v. Seattle School Dist. No. 1*, 458 U.S. at 459. Here, local governments and individual citizens seek to use the Fourteenth Amendment not to protect a racial minority, but to immunize from preemption special

protections that have been conferred upon homosexuals and bisexuals.

The Colorado Supreme Court has created out of whole cloth a new fundamental "group right" not to be "fenced out" from unfettered political participation at all levels of government. This theory embodies a revolutionary change in the structure of state and local political authority, subverting the rule this Court has followed for almost 150 years that "the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure." *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849). *See also Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991). The reasoning of the court below does profound violence to settled understandings of the authority of, and respect for, popular government at the state level. It does so without the remotest support in any prior decision of this Court. Applying either general equal protection analysis or fundamental rights analysis, the decision below should be reversed.

A.

The intent and effect of Amendment 2 is to withdraw a deeply divisive social and political issue from elected representatives and place its resolution squarely in the hands of the people. Core principles of federalism have led this Court to grant States "extraordinarily wide latitude," *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978), in such internal allocations of authority among political institutions. Rare in any context, heightened scrutiny is almost never appropriate where, as here, the challenged state action goes to the heart of state sovereignty. Thus, on its face, Amendment 2 carries with it a strong presumption of constitutionality.

B.

This Court's decisions recognize one clear exception to the rule that state allocations of decisionmaking power are presumed constitutional, *viz.*, when the state action constitutes a "meaningful and unjustified official distinction[] based on race." *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Seattle School Dist.*, 458 U.S. at 470. However, any claim that Respondents should be accorded the same "suspect class" treatment as racial minorities has been strategically waived by Respondents both in the Colorado Supreme Court and in this Court.

C.

Because federal judicial interference with sensitive and core political choices involves an extraordinary departure from the traditional approach demanded by our federalist system, this Court has steadfastly refused to extend *Hunter* beyond the context of racial minorities. *James v. Valtierra*, 402 U.S. 137, 141 (1971). This Court should follow that course in this case.

The new fundamental "group right" recognized below finds no support in any previous decision of this Court, and certainly not in the voting cases relied upon by the lower court. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969). Nothing in Amendment 2 deprives anyone of a right to vote, or to have access to the ballot, or to petition government or to exercise any other fundamental right. Amendment 2 merely reserves to the people the *issue* of special protections for homosexuals and bisexuals. Thus, the voting cases on which the court below relied support the constitutionality of

Amendment 2, which is itself the product of a popular vote. Respondents retain complete freedom to employ the same democratic processes that led to Amendment 2, to reallocate power in the future in ways that they regard as more appropriate.

Furthermore, it is simply impossible, under this Court's equal protection jurisprudence, to characterize an independently identifiable group's ability to define the agendas of all levels of government as a "fundamental right." In fact, this Nation's history and traditions authoritatively preclude any such conclusion. *Seattle School Dist.*, 458 U.S. at 480 n.23. Finally, the "identifiable group-political participation" theory adopted by the Colorado Supreme Court, if upheld, would cast constitutional doubt on a wide range of state and federal legislation, because the definition embraces virtually every conceivable group. No persuasive rationale has been offered by the court below or Respondents to support this proposed sea change in the law.

D.

Amendment 2 is properly subject to rational basis scrutiny and readily satisfies that standard. This Court has held that it "will not overturn . . . a statute unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Amendment 2 unquestionably is rationally related to a number of legitimate state interests, including three which the lower courts found so convincing as to be "compelling" (albeit, not narrowly tailored).

The interests advanced by Amendment 2 fall into three general categories. *First*, given limited resources, the people of Colorado plainly could conclude that anti-discrimination protections should be reserved for those who are particularly deserving of special protection. *Second*, eliminating anti-discrimination provisions that compel landowners and religious institutions to open their facilities to homosexuals and bisexuals is a rational means of protecting the legitimate prevailing preferences of the State's population. Moreover, eliminating the regulatory burdens on privacy and associational interests embodied in the local laws that Amendment 2 preempted, furthers the rational basis which has variously been described as "that government is best which governs least." *Finally*, a single uniform rule has inherent advantages for efficient law enforcement. Eliminating divergent legal standards is certainly a legitimate choice that also eliminates the city-by-city and county-by-county political battles that prevailed prior to Amendment 2. In sum, Amendment 2 is a rational means of implementing legitimate governmental goals and as such it is plainly constitutional.

ARGUMENT

AMENDMENT 2 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment's Equal Protection Clause is "essentially a direction that all persons similarly situated . . . be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. This general rule of deference gives way only in those rare

instances when statutes either utilize "suspect" or "quasi-suspect" classifications, or infringe upon fundamental constitutional rights. *Id.* at 440-41. And where, as here, the challenged decision is a State allocation of authority among political subdivisions, this Court has recognized that intrusive heightened scrutiny is almost never appropriate.

No suspect class, quasi-suspect class, or fundamental right is implicated here. Nor can the new "right" recognized by the court below be upheld under any accepted method of constitutional analysis. To the contrary, affirmance would work a revolution in this Court's equal protection jurisprudence, and would deeply undermine traditional self-government.

A. A State's Allocation of Authority Between Political Subdivisions Should Not Be Disturbed Absent Exceptional Circumstances.

Through Amendment 2, a majority of Colorado citizens rationally chose to withdraw consideration of the question of special legal protections for a concededly non-suspect class from their state and local governmental bodies. It placed this issue exclusively in the hands of the people, preserving Respondents' rights to employ the same electoral process to overturn Amendment 2, if they persuade their fellow citizens that such a course would be more appropriate. The decision below is nothing less than a direct attack on the way the people of Colorado have chosen to govern themselves, through allocating power between themselves and their elected representatives -- a matter that indisputably goes to the heart of state sovereignty. *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) at 47 ("the sovereignty in every State resides in the people of the State, and . . . they may alter

and change their form of government at their own pleasure").

Of course, "[q]uestions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). There is no area in which the presumption of constitutionality finds stronger support than a State's discharge of its "constitutional responsibility for the establishment and operation of its own government . . . ." *Gregory v. Ashcroft*, 501 U.S. at 462; *cf. Coyle v. Oklahoma*, 221 U.S. 559 (1911). Thus, this Court has consistently recognized that equal protection "scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Gregory v. Ashcroft*, 501 U.S. at 469 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973)).[6]

These bedrock principles of federalism demand that this Court accord States "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring

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[6]Indeed, the "unique nature of state decisions that go to the heart of representative government," *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), has led this Court to recognize that even suspect or quasi-suspect classifications may not trigger heightened scrutiny if those classifications are "closely bound up with the formulation and implementation of self-government." *See, e.g., Bernal v. Fainter*, 467 U.S. 216, 221 (1984) (upholding state provision denying top government posts to non-citizens and noting, "[t]he rationale behind the political-function exception is that within broad boundaries a State may establish its own form of government").

authority upon them" or in withdrawing authority from them. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). This is in accord with the long-standing rule observed by this Court that:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. The State, therefore, at its pleasure may modify or withdraw all such powers, . . . conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all of these respects the State is supreme, and its legislative body conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907).

"Judicial incursions in this area may interfere with those aspects of democratic self-government that are most essential to it," *Cabell v. Chavez-Salido*, 454 U.S. 432, 440 (1982), and Respondents therefore bear an especially heavy burden in urging this Court to create new "fundamental rights" that would justify heightened scrutiny of a wide range of decisions at the heart of state sovereignty.

B. There is No Suspect or Quasi-Suspect Class Issue in this Case.

Both the Colorado Supreme Court and Respondents expressly recognize that this is not a "suspect" or "quasi-suspect" class case. This Court has held that only five

classifications are entitled to heightened scrutiny,[7] and has been reluctant to extend that scrutiny to additional classifications. *See Cleburne*, 473 U.S. at 441. Indeed, despite numerous invitations, this Court has declined to do so for over seventeen years. This Court has no occasion to consider that question here: as Respondents themselves admit, after an extensive trial, the trial court rejected their claim that they qualified for suspect or quasi-suspect class protection,[8] and they did not appeal that ruling. Opp. at 14; *see also* Pet. App. B-6 n.3.

Indeed, Respondents not only chose for strategic reasons not to preserve the issue in proceedings below, but also, in urging this Court to deny certiorari, they expressly relied

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[7]*Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race, suspect class); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national ancestry and ethnic origin, suspect class); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage, suspect class); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (gender, quasi-suspect class); and *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (illegitimacy, quasi-suspect class).

[8]Every federal appellate court which has considered this question has similarly rejected this claim. *See, e.g., Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, *reh'g denied*, 909 F.2d 375 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub. nom.*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *National Gay Task Force v. Board of Education*, 729 F.2d 1270, 1273 (10th Cir. 1988), *aff'd mem.*, 470 U.S. 903 (1985).

upon that choice as a reason for denying the petition. Opp. at 14; *see, e.g., City of Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987) (dismissing writ as improvidently granted where argument was neither briefed nor argued to the court of appeals nor raised at the petition stage); *Yee v. City of Escondido*, 503 U.S. 519, ___, 112 S. Ct. 1522, 1533 (1992) (Court considers questions not raised at the petition stage only in "the most exceptional cases").

Here, then, the issue is simply whether Amendment 2 infringes upon a heretofore unknown federally-guaranteed fundamental right. As the Colorado Supreme Court admitted, this "right" is not directly attributable to any case or set of cases decided by this Court, but rather to a "principle" intuited from four separate, distinct lines of authority. Pet. App. D-13 through D-14. For the reasons that follow, none of those lines of authority -- either separately or together -- supports the extraordinary group right utilized by the court below to strike down Amendment 2.

C. There is No Fundamental "Right" for Every "Independently Identifiable Group" to Unfettered Participation at Every Level of Government.

1. This Court's Decisions in *Hunter v. Erickson* and Its Progeny Do Not Support the Fundamental Right Identified by the Colorado Supreme Court.

Our system of government presumes that "even improvident decisions will be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Vance v. Bradley, 440 U.S. at 97.[9] Except where otherwise required by the Constitution, "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 33 (public education not a fundamental right).

The "right" of every independently identifiable group to participate fully in all phases of the political process identified by the Colorado Supreme Court has no basis in the text of the Constitution. Nor, as the court below acknowledged, has this Court ever recognized any such "right." Indeed, if anything, this Court has repeatedly rejected it, as evidenced by the line of cases commencing with *Hunter v. Erickson*, upon which the court below so heavily relied. Under *Hunter* and its progeny, the Equal Protection Clause only prohibits efforts to realign the political process in a manner designed to harm a racial minority. Inexplicably, the Colorado Supreme Court invoked this same line of cases to reach the exact opposite conclusion.

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[9]As Thomas Jefferson once noted:

> [T]he will of the majority, the Natural law of every society, is the only sure guardian of the rights of man. Perhaps even this may sometimes err. But its errors are honest, solitary and short-lived. -- Let us then, my dear friends, forever bow down to the general reason of the society. We are safe with that, even in its deviations, for it soon turns again to the right way.

N.E. Cunningham, *In Pursuit of Reason* 133-34 (1987).

In *Hunter*, this Court reviewed an amendment to a city charter that repealed a racial anti-discrimination ordinance, and required voter approval before such an ordinance could be put into effect. Characterizing the amendment as placing "special burdens on racial minorities within the governmental process," this Court observed:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect" and subject to the "most rigid scrutiny." They "bear a far heavier burden of justification" than other classifications.

393 U.S. at 391-92 (citations omitted).

Notwithstanding the facial clarity of this Court's holding, the Colorado Supreme Court reasoned that the "complexity" of the *Hunter* opinion indicated that the decision could not be based solely on race. Thus, the court below concluded that a general right to participate politically must have been a central element of this Court's holding. The Colorado Supreme Court's interpretation turns the opinion in *Hunter* on its head.[10] The difficult analysis in *Hunter* was not the concern for political participation, but instead was the problem of determining whether *Hunter* was a racial minority case. If political participation had been the

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[10]*See* R. Duncan & G. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 Notre Dame J. of L., Ethics & Pub. Pol. 93, 119 (1995) (dismissing this argument as "uncommonly trivial" because it "overlooks the fact that *Hunter* does not cease to be a 'race' case simply because it is not an easy case. . . . *Hunter* is a complex and difficult racial classification case").

linchpin of the analysis, it would have been wholly unnecessary to decide the much more difficult issue whether the facially neutral city ordinance constituted a "meaningful and unjustified official distinction[] based on race." 393 U.S. at 391. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). And this Court's comprehensive analysis of that issue demonstrates plainly that race was the determinative factor in the case.[11]

Two years later, this Court unequivocally refused to extend *Hunter* to non-suspect classes. *James v. Valtierra*, 402 U.S. 137 (1971), concerned the validity of a California constitutional provision prohibiting state public bodies from developing, constructing, or acquiring low income housing projects without prior approval by a majority vote in a city, town, or county referendum. A lower court had ruled, based on its reading of *Hunter*, that the California measure unconstitutionally discriminated against poor people in the exercise of their right to seek redress from governmental

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[11]The *only* support in *Hunter* for the decision below is the isolated comment of this Court that a "State may [not] disadvantage any particular group by making it more difficult to enact legislation on its behalf . . . ." *Hunter v. Erickson*, 393 U.S. 385, 393 (1969). To be sure, this single reference does not explicitly mention race or any other suspect class, but it cannot be read outside of the Court's overall analysis of race in that opinion. Moreover, any doubt about the sweep of that statement should have been eliminated when it was not applied in *James v. Valtierra*. At the end of the day, this one line in *Hunter* simply cannot bear the weight the court below and Respondents would place on it.

authorities. This Court disagreed, finding that, unlike in *Hunter*,

> it cannot be said that California's Article XXXIV rests on "distinctions based on race." . . . *The present case could be affirmed only by extending Hunter, and this we decline to do.* [Respondents] suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective, when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But, of course, a law-making procedure that "disadvantages" a particular group does not always deny equal protection.

Id. at 141-42 (emphasis supplied).

In its initial opinion, the Colorado Supreme Court rewrote *James* by characterizing it as "best understood as a case declining to apply suspect class status to the poor, and not as a limitation on *Hunter*." Pet. App. D-20 through D-21 n.21. That characterization is mystifying. *Hunter* did not apply to the poor, because poverty is not a suspect classification, much less a racial classification. That reasoning should control this case as well.

In *Seattle School Dist.*, this Court again reaffirmed race as the touchstone for the *Hunter* doctrine. There this Court invalidated a voter-initiated statute which removed the power of school boards to order busing to desegregate schools. This Court confirmed that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action." It is only "when the State allocates

governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process" that a different analysis is required. 458 U.S. at 470 (emphasis in original). Indeed, as the majority noted, the core rationale of this line of cases is:

> when the State's allocation of power places unusual burdens on the ability of *racial* groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Id. at 486 (emphasis supplied) (citations omitted).[12]

Thus, *Hunter*, *James*, and *Seattle School Dist.*[13] call

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[12]That race was the controlling factor in the decision is underscored by this Court's repeated emphasis on the racial nature of the classification at issue. *E.g.*, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 470-71, 474, 485-86 (1982).

[13]The Colorado Supreme Court also claimed support for its reading of *Hunter* in *Gordon v. Lance*, 403 U.S. 1 (1971). *See* Pet. App. D-19 through D-22. This heavy reliance upon *Gordon* is puzzling. There, this Court rejected *both* approaches employed by the court below -- extending the *Hunter* doctrine beyond racial classifications, and expanding the ballot access cases to state actions that merely

for strict scrutiny *only* when the political process has been restructured to place unusual burdens upon "those groups . . . relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Seattle School Dist.*, 458 U.S. at 486; *see also James*, 402 U.S. at 141-42. The case is, therefore, this simple: the *Hunter* rule comes into play *only* to protect racial minorities -- or at its most expansive, members of a suspect class.[14] Thus, *Hunter* provides no support for the holding below.[15]

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make it more difficult for some kinds of governmental actions to be taken. Instead, this Court affirmed a single issue supermajoritarian vote requirement. That holding thus provides significant support for Amendment 2, not for the holding below.

[14]*See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (cited in *Seattle School Dist.*; "political powerlessness" phrase used to describe suspect class); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (same; also, correlating the "discrete and insular minorities" language of *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) to the concept of "suspect" class).

[15]Professor Tribe's comprehensive analysis also recognizes that *Hunter* and *Seattle School Dist.* concern discrimination against "discrete and insular minorities," rather than "rights of political participation." *Compare* ch. 13 ("Rights of Political Participation"), *with* ch. 16 ("The Model of Equal Protection.") L. Tribe, *American Constitutional Law* (2d ed. 1988). *Accord Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) (characterizing *Hunter* as striking "down a city charter amendment requiring voter approval of certain

2. Amendment 2 Does Not Infringe the Right to Vote or Any Other Recognized Right Relating to Political Participation.

The Colorado Supreme Court also claimed support for its decision from cases such as *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969). Those cases concern the fundamental right to vote, not the "identifiable group right to political participation" intuited by the court below. *Reynolds v. Sims*, for example, stands for the proposition that the right to vote, read together with the Equal Protection Clause, requires the representation of like numbers of people, rather than geographic areas. And *Kramer v. Union Free School Dist.*

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antidiscrimination ordinances on the ground that the amendment created a classification based on race"); *Lee v. Nyquist*, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd mem.*, 402 U.S. 935 (1971) ("The principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."); *Arthur v. City of Toledo*, 782 F.2d 565, 571-74 (6th Cir. 1986) (*Hunter*, *James*, and *Seattle School Dist.* reflect prohibition of racial discrimination); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4th Dist. 1991) ("*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"). *See also* Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 Vand. L. Rev. 397, 421-26 (1985) (*Hunter* doctrine limited to state action embodying a racial classification).

held only that the right to vote may not be voided on the basis of whether one is a property owner or a parent.

At root, these voting cases involve the process of electing representatives. They do not concern the *range of issues* that all voters may or may not vote upon. They certainly do not implicate a restructuring of the overall political process. *See, e.g., Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 898 (2d Cir. 1980) ("The one-person, one-vote doctrine requires no more, and does not create rights and privileges beyond the warranty of mathematical equivalency of votes"). And Amendment 2 does not present a case where homosexuals and bisexuals have been denied the right to vote in upcoming elections,[16] or where reapportionment or other state action has diluted the value of their individual votes.[17]

The court below further attempted to justify its ruling on the basis of this Court's decisions in *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). Those cases are likewise wholly inapposite. In *Williams*, this Court held that a complex state statutory scheme violated the rights to vote and to associate, because it had the effect of excluding from the ballot all but the candidates of the two major political parties. In *Illinois State Bd. of Elections*, this Court

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[16]*Compare Hill v. Stone*, 421 U.S. 289 (1975) (invalidating provision limiting voters in city bond elections to persons who have listed property for taxation); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (invalidating provision limiting voters in school district elections to persons owning or leasing taxable real property, or parents or custodians of children enrolled in schools).

[17]*Compare Reynolds v. Sims*, 377 U.S. 533 (1964).

reviewed a scheme that placed higher burdens on new or third-party candidates for local offices than for statewide offices. As in *Williams*, this Court struck down the scheme because it placed an unacceptable burden upon the rights to vote and to associate. Neither case stands for anything more than that the Constitution will not permit burdens on access to the ballot which are designed to protect the established parties.

Amendment 2, of course, presents no obstacles whatsoever to particular candidates or political parties. Indeed, homosexuals and bisexuals have the same access to the ballot -- including the initiative process through which Amendment 2 was adopted -- as all other Colorado citizens. Rather than burdening any person's rights to vote or associate, Amendment 2 simply raises a certain issue to a constitutional level. Neither the fundamental right to vote, nor the right to petition government, encompasses a right to require the state legislature or a local government to entertain matters that are beyond its authority to address. *See Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464-65 (1979). *See also* Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 142-43, 159-61, 165-66 (1986).[18]

Respondents continue to have precisely the same rights as *anyone else* who has lost an election. They may continue to participate fully in all of Colorado's political processes; what they do not have is a right to *successful* participation in those processes. Thus, to the extent they are relevant at all,

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[18]If the Colorado Supreme Court is correct that Respondents have this broad right, then laws restricting marriage, certain tax benefits, and military service to heterosexuals are also constitutionally suspect on this ground.

the voting cases support the validity of Amendment 2, which came about as the result of a statewide vote. The right to vote can be infringed just as effectively by nullifying votes as by preventing them from being cast in the first place.

It is quite apparent, then, that the "'precondition,' 'reapportionment,' and 'candidate eligibility' cases are not dispositive of, or directly controlling on," the case at bar. Pet. App. D-13. It is further apparent that the *Hunter* doctrine is not the "principle [which] unifies these cases, despite the different factual and legal circumstances presented in each of them." *Id.* at D-14. The cases that actually provide a unifying principle governing this case are those that hold that, absent a clearly applicable constitutional impediment, States are completely free to structure their governmental decisionmaking authority without judicial interference. Colorado's Amendment 2 fits squarely within that principle and therefore should be upheld because it rationally serves legitimate governmental purposes.

3. The "Right" Recognized by the Court Below Cannot Be Upheld Under the Accepted Constitutional Analysis Embraced by this Court.

The group "right" to political participation identified by the court below as fundamental is also wholly inconsistent with this Court's accepted methodology for identifying fundamental rights. At the outset, the decision below is fatally flawed because it blurs and attempts to fuse fundamental rights and equal protection jurisprudence into a new "substantive equal protection." The Equal Protection Clause serves as a mechanism for balancing competing constitutional interests. Where a suspect classification or fundamental right is present, the balance usually tips in favor of the individual. However, the Clause is not, itself, a source of

fundamental rights; such rights must be found elsewhere in the Constitution.

Fundamental rights are those "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). Such rights have also been characterized as "deeply rooted in this Nation's history and tradition." *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The utility of these approaches

> lies in their effort to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government . . . and they seek to achieve this end through locating fundamental rights either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 747 (1986) (White, J., dissenting) (citation omitted). *See Bowers v. Hardwick*, 478 U.S. at 192-94 (applying traditions and consensus tests).[19]

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[19]"The danger of expanding rights is clear: expansions of 'rights' essentially remove power from the democratic process and thereby limit the capacity of self-government. It would be possible to expand rights so far that self-government itself would become a meaningless concept. This danger is particularly acute when judges are asked to invent new rights, not in accord with American history and tradition, and impose them on a culturally divided nation by

The "right" to demand preferential treatment from *any* level of state or local government is neither "deeply rooted in this Nation's history and tradition," nor "implicit in the concept of ordered liberty." Quite to the contrary, this "right" represents a radical departure from our democratic traditions, and the resulting political chaos is the antithesis of any notion of ordered liberty. "The fabric of American empire ought to rest on the solid basis of *the consent of the people*. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority." *The Federalist, No. 22* (A. Hamilton) (emphasis in original).

The people may legitimately give their consent to their government either through elected representatives, or through direct participation. "The referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to veto power, over enactments of representative bodies. This practice is designed to 'give citizens a voice on questions of public policy.'" *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 673 (1976) (quoting *James v. Valtierra*, 402 U.S. at 141). Indeed, in every State, the people themselves retain the power to approve or disapprove amendments to their respective constitutions,[20] and "[p]rovisions for referendums

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reading them into the Constitution." D.M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 Iowa L. Rev. 1067, 1100 (1991).

[20]Council of State Governments, *The Book of the States* at 42-43 (1990).

demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James v. Valtierra*, 402 U.S. at 141.[21]

Even a referendum that "disadvantages" a particular group is presumptively valid, unless it targets a suspect class. *Id.* at 141-42. Indeed, as recently as 1991, this Court in *Gregory v. Ashcroft* evaluated a State's mandatory retirement scheme for judges under the rational basis test, despite the obvious fact the scheme discriminated against a group -- the elderly -- which has been, and still is, the subject of discrimination. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

As was the case in *Gregory*, the people retain the right to decree that these decisions may be made only at the highest level: the state constitution. There simply is no "vested constitutional right to local decisionmaking," *Seattle School Dist.*, 458 U.S. at 480 n.23; for this reason, Colorado, like other States,

> permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Anytime a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent

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[21]*Cf. Grant v. Meyer*, 828 F.2d 1446, 1455 n.14 (10th Cir. 1987), *aff'd*, 486 U.S. 414 (1988) (quoting *McKee v. City of Louisville*, 200 Colo. 525, 530, 616 P.2d 969, 972 (1980) (The initiative is "a fundamental right at the very core of our republican form of government."))

> unfairness in this and certainly no constitutional violation.

Seattle School Dist., 458 U.S. at 496 (Powell, J., dissenting).[22]

Rather than permitting the range of issues associated with homosexuality to be widely debated and determined through the political process, however, the Colorado Supreme Court has determined that the federal Constitution dictates the terms of political debate. Its decision slashes across core constitutional values of state sovereignty and self-government, making any distinction made by government in the establishment of its political structure vulnerable to constitutional attack. It is indisputable that under this Court's well-settled precedent the Colorado General Assembly was constitutionally free not to pass laws giving homosexuals and bisexuals protected status, to repeal any such previously enacted laws, and to refuse to pass any similar laws in the future. *See Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527 (1982).

In *Crawford*, this Court upheld a California constitutional amendment prohibiting state courts from ordering race-based public school student assignments, unless required under the federal Constitution. "[H]aving gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally

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[22]*See also Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984) ("When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason.")

throughout the United States." *Id.* at 542. However, under the reasoning of the Colorado Supreme Court, the California provision "fenced out" an "identifiable group" -- in that case, a *suspect class* -- from the ordinary political process. Nonetheless, this Court upheld the measure 8-1, noting that "We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and its ability to experiment. This interpretation has no support in the decisions of this Court." *Id.* at 535. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Crawford controls this case. Through Amendment 2, Colorado has simply defined the package of civil rights available to homosexuals and bisexuals under the Colorado Constitution as no larger than that provided by the Constitution and laws of the United States. The only difference between the two cases is that *Crawford* dealt with a suspect classification, and this case does not.

Achieving this same result through the people themselves, rather than their representatives, can hardly be suspect; indeed, it cannot be seriously maintained that the people have *less* power than their elected representatives. Rather, the cornerstone of our constitutional system is that the people are the source of all governmental authority, and retain the power to control their representatives:

> [T]he ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere over the other. Truth, no less than decency, requires that the event in every case

should be supposed to depend on the sentiments and sanction of their common constituents.

The Federalist, No. 46 (J. Madison). Surely, the traditions of this country, and concepts of ordered liberty do not mandate that representatives must be masters of their constituents.

4. The Rationale of the Decision Below is Sweeping and its Consequences are Devastating.

The "right" identified by the Colorado Supreme Court extends to all identifiable groups, and is effectively unqualified. If, as Respondents and the courts below concede, sexual orientation is not a suspect classification, there plainly is no principled way to limit the scope of the group "right" recognized by the Colorado Supreme Court. Accordingly, that "right" can be used to attack a wide range of routine federal and state legislation.[23]

What makes this result breathtaking is the impossibility of confining in any meaningful way the concept of "independently identifiable groups" which are entitled to heightened judicial scrutiny when they challenge adverse legislative

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[23]"The potential scope of the right recognized by the Colorado court in *Evans* [*v. Romer*] is breathtaking. If the court means what it says, it has discovered a constitutional right of any 'independently identifiable class of persons' to have its political agenda insulated against the constitutional rights of others." R. Duncan and G. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 Notre Dame J. of Law, Ethics & Pub. Pol'y at 116.

action. Any conceivable group, from a boy scout troop to a group of tax protestors, fits the definition.

Furthermore, the *Hunter* doctrine that Respondents seek to extend beyond the suspect class context, makes no distinction regarding constitutional provisions, and applies with equal vigor to statutes, ordinances, and any other governmental action. *See Hunter v. Erickson* (voter-initiated charter amendment); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235, 1241 (S.D. Ohio 1993), *injunction made permanent*, 860 F. Supp. 417 (S.D. Ohio 1994), *appeal filed*, Nos. 94-3855 and 94-3973 (6th Cir. 1994) (same); *Seattle School Dist.* (voter-initiated statute); and *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd mem.*, 402 U.S. 935 (1971) (statute passed by state legislature).

Consequently, extending the *Hunter* doctrine to non-racial classifications calls into question every federal and state measure that draws a distinction between different groups of people -- and there are few measures that do not draw such distinctions. Although superficially appealing, "identifiable group" analysis quickly becomes a morass, as beliefs and conduct become blurred with immutable characteristics. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring) ("identifiable group" is one "that possesses distinctive interests and tends to vote on the basis of those interests," including "political, religious, ethnic, racial, occupational, and socioeconomic groups"); *Karcher v. Daggett*, 462 U.S. 725, 754 n.12 (1983) (Stevens, J., concurring) ("Identifiable groups will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context.")

A vast array of federal tax, regulatory, and social legislation affects groups that are "independently identifiable" based upon income, occupation, residence, health, age, or any number of other factors. State laws that might provide greater benefits or protections to any of these groups are preempted if they conflict with the purposes of federal legislation. U.S. Const. art. VI. Under the Colorado Supreme Court's reasoning, however, every such instance of preemption may violate the equal protection rights of the affected group to seek additional benefits at the state or local level.

Moreover, Colorado, like other States, through tax, safety, environmental, and other legislation, routinely makes distinctions between, and imposes burdens on, "identifiable groups" on the basis of income, occupation, property ownership, residency -- even sexual orientation.[24] The Colorado Constitution, likewise, burdens "identifiable groups" that desire public abortion funding, the re-election of incumbent officials, the reorganization of certain school districts, and certain municipal annexations. If homosexuals and bisexuals are "fenced out" by Amendment 2's prohibition of special protections, then surely those who favor public funding for

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[24]For example, courts have typically upheld statutes refusing to recognize same-sex marriages under a rational basis test. *E.g.*, *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187, 1194 (1974). *Accord Adams v. Howerton*, 486 F. Supp. 1119 (S.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972); *In re Estate of Cooper*, 149 Misc.2d 282, 564 N.Y.S.2d 684, 687 (N.Y. Surr. Ct. 1990), *aff'd*, 187 App. Div. 128, 592 N.Y.S.2d 797, *appeal dismissed*, 82 N.Y.2d 801, 604 N.Y.S.2d 558, 624 N.E.2d 696 (1993); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

the fundamental right to an abortion are "fenced out" by the restrictions of Colo. Const. art. V, § 50; advocates for any other medical procedure must seek only a statute.[25] Those who favor the reelection of incumbent state officials are "fenced out" by Colo. Const. art. IV, § 1; Colo. Const. art. V, § 3. Certainly, the many parents who do not want their children included in the Denver Public Schools would believe they are "fenced out" by Colo. Const. art. XX, § 7; residents of any other school district may divide or reorganize their district by obtaining a statute. The citizens of the City and County of Denver are "fenced out" from annexing property in the same manner as citizens in other municipalities by Colo. Const. art. XX, § 1 and art. XIV, § 3.

In truth, any distinction made by government in the establishment of its political structure would be vulnerable to constitutional attack under the lower court's theory. Under the Colorado Supreme Court's ruling, any individual voter whose cause is unsuccessful in a referendum would be entitled to overturn that referendum, simply because the majority imposed its will on a minority concern. Major public policy issues could never be decisively settled through the political process; government would be obliged continually to reconsider every policy choice. *See* Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 Vand. L. Rev. 397, 428 (1985) ("Taken to its logical extreme, then, the equal protection clause could

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[25]Such provisions are patently constitutional. *See Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

establish a tyranny of the *minority*, or, worse, the *courts*, over the will of the people.") (emphases in original).[26]

The principle adopted by the court below is also incoherent because it leads to equally valid constitutional claims on both sides of every political issue. For example, under the decision below, a state constitutional amendment preempting local ordinances that allow public cigarette smoking would violate the constitutional right of smokers, an independently identifiable group, to have their cause determined at the local level. The theory adopted below, however, would give rise to a competing and *equally valid* claim on the other side -- the right of non-smokers to have their interests decided at the state level. Indeed, neither the court below nor Respondents have any principled explanation for why the *supporters* of Amendment 2 do not have an equally compelling right to have *their* interests determined at the state level.

Only the clearest constitutional justification could support such revolutionizing of traditional methods of government. The desire of interest groups to be free of measures designed to place ultimate policy decisions in the hands of the people simply cannot justify shifting away from a presumption of constitutionality in favor of intrusive heightened judicial scrutiny.

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[26]"Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left." A. Lincoln, *First Inaugural Address* (Mar. 4, 1861).

D. Amendment 2 is Subject to, and Readily Satisfies, Rational Basis Review.

Because Amendment 2 does not infringe upon any fundamental right, its validity depends solely on whether "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993). Under the rational basis test, this Court:

> will not overturn . . . a statute unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Vance v. Bradley, 440 U.S. at 97. *Accord Gregory v. Ashcroft*, 501 U.S. at 470-71 (applying rational basis test to state constitutional provision). In applying this test, this Court asks only whether there is any reasonably conceivable state of facts that provide a rational basis for the classification. *Heller*, 113 S. Ct. at 2642. "A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* at 2643. Rather, "'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Id.* *Accord Gregory v. Ashcroft*, 501 U.S. at 470-71; *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).

The rational basis inquiry in this case does not depend upon mere theory, however, because the State argued, and presented convincing evidence, that in removing or preventing governmental regulation in this area, Amendment 2 promotes freedom of choice (relating to matters of

personal and familial privacy, religion, and association), furthers several legitimate societal concerns (relating to the integrity of civil rights laws and the contours of social and moral norms), and achieves statewide uniformity.

Significantly, neither the trial court nor the Colorado Supreme Court found any of these purposes to be illegitimate or unreasonable. Indeed, between them, the two courts recognized that there are three "compelling" public purposes served -- albeit inexactly -- by Amendment 2. Those interests were the promotion of religious freedom, the promotion of familial privacy, and the preservation of associational privacy. Pet. App. B-11 and B-13; Pet. App. C-14. Because the means need not be narrowly tailored to achieve these ends under the rational basis test,[27] these interests would, *a fortiori*, satisfy that test.

Given the nature of the rational relationship standard, many other rational justifications undoubtedly could be established. No useful purpose would be served in attempting to canvass exhaustively the field of legitimate objectives.

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[27]Indeed, under that test, courts must "accept a legislature's generalization even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.' 'The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific.'" *Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993). *Accord Gregory v. Ashcroft*, 501 U.S. at 471 (upholding state constitutional provision requiring judges to retire at age 70) ("It is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all.")

Instead, the State demonstrated below that the interests identified plainly satisfy the rational basis standard.

1. Amendment 2 Maintains the Integrity of Civil Rights Laws.

The supporters of Amendment 2 were acutely aware that laws and policies designed to benefit homosexuals and bisexuals could have an adverse effect on the ability of state and local governments to combat discrimination against suspect classes. *See An Analysis of 1992 Ballot Proposals*, Pet. App. F-8. Owing to the state constitutional fiscal constraints which are necessarily a part of public administration,[28] unlimited resources are not available to combat discrimination. Therefore, it is incumbent upon the State to set priorities for its enforcement efforts. Amendment 2 is an appropriate means by which the people sought to focus government's limited resources upon those circumstances most warranting attention. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (remedying specific instances of racial or sexual discrimination is a compelling interest); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (same).

When Amendment 2 was proposed, the Colorado Civil Rights Commission had voted to recommend to the General Assembly that it add sexual orientation protections to the State's civil rights statutes. This recommendation was made, despite the fact that the Commission's investigative arm, the Colorado Civil Rights Division, had experienced steadily increasing demands upon a shrinking budget, and the existence of substantial evidence that homosexuals and bisexuals were not, as a class, in need of such protections

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[28]*Cf.* Colo. Const. art. X, § 20.

(v. 9, p. 19; v. 15, p. 866; v. 16, pp. 1085-91, 1096-97; v. 17, pp. 1155, 1173).

Here, the State -- like Congress (J.A. 204) -- could legitimately determine that special protections for suspect and other needy classes should not give way to demands for inclusion of a politically powerful[29] and relatively privileged[30] special interest group. Indeed, three former

[29]The spending and voting patterns associated with Amendment 2 itself amply demonstrate that homosexuals are politically powerful. To date, activists have been successful not only in effecting the repeal of sodomy statutes in 27 States (v. 17, pp. 1254-55), but also in securing special protections in jurisdictions comprising over one quarter of our Nation's population. (v. 14, pp. 649, 652). And, among other things, through one of the country's largest political action committees, they have persuaded Congress to list sexual orientation in the federal hate crimes statute. (v. 16, pp. 907, 933; v. 17, pp. 1253, 1255, 1257).

[30]Respondents' own witness conceded that "with respect to the people who are so identified, it looks like gays, lesbians, and bisexuals continue to be more affluent than the average" and "[t]end to have higher levels of education." (v. 19, pp. 1414-15). Indeed, as one pro-gay rights article put it "gay men and lesbians suffer no discernible communal economic deprivation and already operate at the highest levels of society: in the boardroom, the media, the military, the law, and industry." Df. Aff. 6 (Barry Gross) at 26 (v. 18, p. 1341; v. 19, pp. 1349-51). This was in accord with the extensive evidence presented by Petitioners. *See, e.g.*, v. 16, pp. 920, 932; v. 17, p. 1155; Df. Aff. 9 (James Hunter) at 9-10 (J.A. 254-55; v. 18, p. 1341; v. 19, pp. 1349-51); Df. Exs. V (Simmons Market Survey) (v. 16, pp. 908-09), EEE (USA Today Analysis of U.S. Census Bureau

Chairmen of the Colorado Civil Rights Commission strenuously opposed the inclusion of homosexuals under the ambit of the civil rights statute (v. 15, p. 867); one said that such action represented "a drastic departure" from the historical aims of the civil rights laws (v. 17, p. 1156).[31]

2. Amendment 2 Enhances Individual Freedoms.

Another obvious interest served by Amendment 2 is that it enhances individual freedom by eliminating governmental interference in the choices people make in religious, familial, personal, and associational matters. Both the United States Constitution and the Colorado Constitution explicitly recognize the importance of religious liberty, U.S. Const. amend. I, Colo. Const. art. II, § 10, and this Court has recognized

data) (v. 16, p. 924), MMM (Overlooked Opinions, Inc. Survey) (v. 16, p. 924).

[31]Indeed, part of the Amendment 2 debate was whether granting protected class status would lead to affirmative action for homosexuals and bisexuals. (J.A. 172, 202; v. 16, pp. 982, 1057-59). In San Francisco, for example, the mayor "promised to represent 20 percent of his administration in city government with homosexuals" (v. 16, p. 1057), and an affirmative action plan for homosexuals has since been considered in the City and County of Denver. *See Denver Will Recruit Homosexual Cops*, Rocky Mountain News, Mar. 24, 1994, at 4A. *See also* J.S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 Yale L. & Policy Rev. 47 (1993); Pl. Ex. 117 (City of Aurora rule on equal opportunity and affirmative action) (J.A. 94, v. 19, pp. 1348-49).

the importance of preserving spheres of personal liberty, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923), including a right of intimate association. *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). In truth, these interests are, cumulatively, nothing more than the individual liberty that this nation has cherished for over two centuries. At the heart of that individual liberty is the freedom to make personal choices regarding with whom one wishes to associate, and how one wishes to be governed.

The concerns surrounding religious liberty are quite obvious and substantial. *See* R. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393 (1994). Under the ordinances preempted by Amendment 2, individual landlords or employers who have sincere and profound religious objections to homosexuality would nonetheless be compelled to compromise those convictions under threat of government sanctions. *See Donahue v. Fair Employment & Housing Comm'n*, 2 Cal. Rptr.2d 32 (Cal. App. 2d Dist. 1991), *review dismissed*, 23 Cal. Rptr.2d 591, 859 P.2d 671 (Cal. 1993). *See also* Df. Aff. 17 (Artine Yapoujian) (v. 18, p. 1341; v. 19, pp. 1349-51) (employer sanctioned because his wife gave religious literature to homosexual employee). Thus, Amendment 2 accommodates significant and legitimate liberty interests.

The ordinances do not merely restrain the choices available to individuals. In Aspen, for example, § 13-98 of the sexual orientation ordinance required churches to make their facilities open to homosexual organizations if they were open to any community organization. Pl. Ex. 48 (J.A. 90-92, v. 7, pp. 148-49). Moreover, churches apparently could not refuse to hire any employees, including clergy, on the basis of their sexual orientation; title 12 of the Boulder

municipal code did not allow a church or religious organization with deeply held moral views regarding homosexuality to refuse to hire someone based on his or her sexual orientation (v. 16, pp. 1068-75). To promote free exercise values by withdrawing the authority to adopt legislation in this area altogether may not be a tailored response, but it certainly is a rational means of ensuring that core religious values are protected from infringement.

In addition to religious liberty, Amendment 2 protects notions of personal privacy and intimate association. For example, Ann Ready of Madison, Wisconsin, testified she shared a house with four other women, but refused to share it with a lesbian. She stated that she "had rejected several heterosexual males for the same reason, namely the potential for [unwanted] physical, sexual attraction." Df. Aff. 12 at 5 (v. 18, p. 1341; v. 19, pp. 1349-51). Ms. Ready was subsequently found to have violated both municipal and Wisconsin state sexual orientation laws. *Id.* at 9-10. Preventing this sort of intrusion into personal matters of the utmost privacy is a legitimate interest. "The choice of household companions -- of whether a person's 'intellectual or emotional needs' are best met by living with family, friends, professional associates, or others -- involves deeply personal considerations as to the kind and quality of intimate relationships within the home." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 15 (1974) (Marshall, J., dissenting).

Ordinances of the type repealed by Amendment 2 also affect familial privacy and the ability of parents to convey values to their children. This Court has expressly acknowledged that:

> the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.

> It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977).[32] The implicit endorsement of homosexuality fostered by laws granting special protections could undermine the efforts of some parents to teach traditional moral values. It is certainly rational for the State to seek to prevent this kind of confusion.

The decision of the people of Colorado both to restore and preserve these liberties -- as well as an even more general right of association or non-association which exists in the absence of special protection laws -- is reflective of the time-honored view that "[t]hat government is best which governs least."[33] Clearly, Amendment 2's restoration and preservation of individual freedom, through removal or prevention of governmental regulation, is a legitimate public purpose. As this Court has recognized,

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone -- the most comprehensive

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[32]*See also Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 232 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., Warren, C.J., and Brennan, J., concurring); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

[33]Thomas Paine, *quoted in* G. Seldes, *The Great Thoughts* 320 (1985); although variously attributed to Thomas Jefferson and Henry David Thoreau.

> of rights and the right most valued by civilized man.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (quoted with approval in *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 n.10 (1972)).

3. Amendment 2 Achieves Statewide Uniformity and Deters Factionalism.

It is advantageous to the State to have uniform civil rights laws, both to promote efficient enforcement, and to maximize individual liberty, including the preservation of traditional social norms. The State also benefits from creating an environment where large employers and property owners may operate under uniform laws, thereby providing greater economic and legal predictability in their affairs. Equally important is the necessity of ensuring that the deeply divisive issue of homosexuality does not serve to seriously fragment Colorado's body politic. Df. Aff. 9 (James Hunter) at 14 (J.A. 264-65, v. 18, p. 1341, v. 19, 1349-51).[34]

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[34]In addition, Harvard University Government Professor Harvey Mansfield testified that enacting Amendment 2 through the initiative process supported stability and respect for the political process, by giving "the people a sense that . . . government is not alien to them, and that they can get together by their own initiative . . . to produce a result that gives them a sense of satisfaction and accomplishment." (J.A. 197-98).

Ensuring the stability of a State's political system through combatting "unrestrained factionalism," such as here, is certainly a legitimate, indeed compelling, interest. *Storer v. Brown*, 415 U.S. 724, 736 (1974) (upholding statutory provisions barring independent candidates from the general election ballot if they had been defeated in a party primary that year, or had been registered with a political party within the past year); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (noting the importance of the State's interest in avoiding political fragmentation in the context of elections wholly within state boundaries). Amendment 2 furthers this interest by eliminating city-by-city and county-by-county battles over the political issue of homosexuality and bisexuality. (J.A. 210). Consequently, Amendment 2 serves an important state interest by promoting statewide uniformity on this issue.

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Amendment 2 infringes upon no fundamental right and is amply supported by numerous rational bases. It does not encourage or authorize public or private discrimination in contravention of the Fourteenth Amendment. While a state or local government can grant more protection than that required by the United States Constitution, a state or local government can also rescind that additional protection -- and prohibit its subsequent reextension -- without committing a federal constitutional violation. *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. at 538-39. Amendment 2 does nothing more.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted this 21st day of April, 1995.

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